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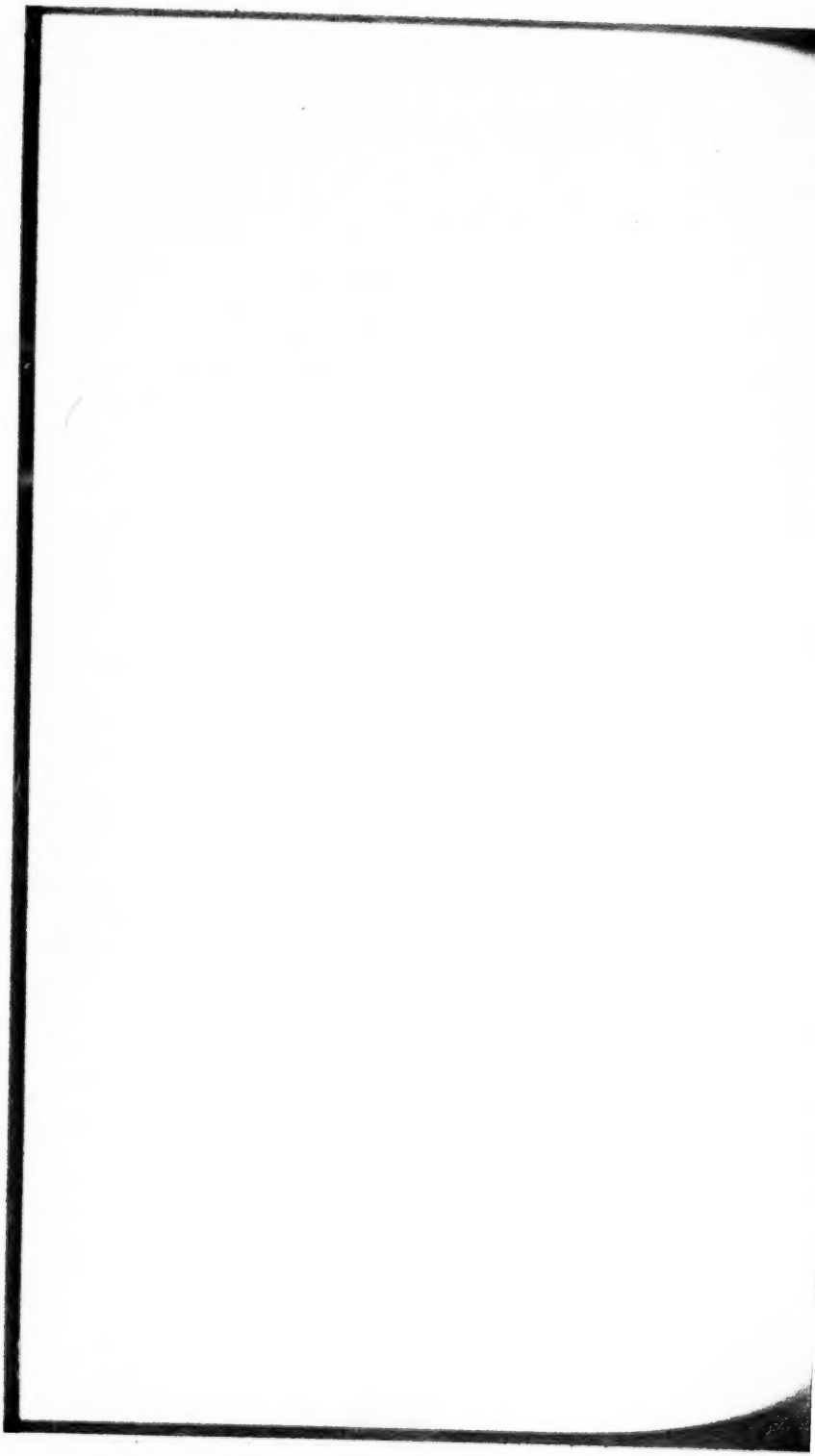
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

BISHOP PROCESSING CO.,
A BODY CORPORATE OF THE STATE OF MARYLAND
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Fourth Circuit entered on March 3, 1970 affirming on Order of the federal District Court of the District of Maryland at Baltimore entered against Petitioner on November 10, 1969.

OPINIONS BELOW.

An opinion was filed by the United States District Court, District of Maryland at Baltimore on October 27, 1969, a copy of which is attached. It was not published to the knowledge of petitioner.

An opinion was filed on March 3, 1970, by the United States Court of Appeals for the Fourth Circuit, a copy of which is attached. It has not as yet been published to the knowledge of the petitioner.

JURISDICTION.

The opinion and order of the United States Court of Appeals for the Fourth Circuit was filed on March 3, 1970. The Circuit Court initially ordered that Petition for Writ of Certiorari be filed within 15 days from March 3, 1970. This time limitation was extended by Judge Sobeloff until April 1, 1970.

The basis of jurisdiction in this case is 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

I. Whether the principles of law governing the interpretation of agreements between private parties apply to court-approved consent agreements.

II. Whether thirty-one instances of malodor over a consecutive fourteen-week observation period constitutes as a matter of law a violation of the federal Clean Air Act, 42 U. S. C. § 1857, *et seq.*, without regard for seasonal variations in relevant meteorological conditions (*e.g.*, wind direction and speed, temperature, humidity and precipitation), the duration of each malodor, the degree of offensiveness of each malodor, and the geographic pervasiveness of each malodor.

III. Whether a series of unreasonable time limitations imposed upon petitioner by the federal District Court and federal Court of Appeals are such as to amount to a deprivation of due process of law.

STATUTES INVOLVED.

Federal Clean Air Act, 42 U. S. C. § 1857, et seq.

Delaware Air Pollution Control Act, Title 7, Section 6200, et seq.

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STATEMENT.

This case involves the activities of the petitioner's plant which is in the business of rendering animal by-products. The allegation presented by the respondent, United States of America, is that malodor eminating from the petitioner's plant located in Bishop, Maryland is pervading the town of Selbyville in the State of Delaware.

Prosecution of the case is based upon the federal Clean Air Act, 42 U. S. C. § 1857, *et seq.*, and it is under this Act that jurisdiction was founded in the federal District Court for the District of Maryland at Baltimore.

The petitioner conducts a business whereby animal wastes are cooked, water is removed, fat is extracted, and the remaining substance is reduced to a highly nutritional meal used as an ingredient in animal feed. It employs approximately 35 to 40 men in an area which is designated as "depressed" by the United States Department of Labor.

Production began in September of 1955. On March 7, 1968, after a series of United States Department of Health, Education and Welfare conferences under the provisions of the federal Clean Air Act 42 U. S. C. § 1857, *et seq.*, a complaint was filed by the government against petitioner in the United States District Court for the District of Maryland at Baltimore (4A to 13A). The complaint charged that the petitioner by discharging malodorous pollutants into the air had caused "air pollution" in the town of Selbyville, Delaware and environs (4A). It was alleged that these odors endangered the health and welfare of the people of the town (4A).

On November 1, 1968, the complaint was resolved by a consent decree signed by petitioner and respondent whereby petitioner agreed in substance to terminate all rendering activities if it could be established that petitioner had committed malodorous air pollution in the State of Delaware

(43A). The parties agreed that the Director, Air Pollution Control Division, Water and Air Resources Commission of the State of Delaware, be selected to make this determination.

The petitioner was convinced that no air pollution, in fact, existed. Nevertheless, the respondent on February 7, 1969, filed a motion seeking to close the petitioner's plant. Thereafter, a hearing was set up for March 3, 1969, in the federal District Court, but was actually held on March 4, 1969 due to the Judge's direction. The federal District Judge refused to issue the injunction requested by the petitioner and reserved ruling (66A, 67A, 68A).

Thereafter, no action took place for three full months. Then in May, 1969, the respondent began to gather materials. A full six months after the first hearing, on September 12, 1969, the respondent filed another motion seeking the same injunction and on September 24, 1969, a summary hearing was held (69A).

On October 27, 1969, the lower court filed an opinion and on November 10, 1969, it filed an order granting the injunction. The order was stayed pending appeal.

Appeal was thereafter made to the United States Court of Appeals for the Fourth Circuit on an accelerated basis. It is of great importance to note that throughout this procedure since November 1, 1968, all matters relating to petitioner were placed on an accelerated basis, whereas those relating to respondent were permitted to proceed at a casual rate.[1]

On March 3, 1970, the Fourth Circuit Court affirmed the lower court. It is from that decision that this appeal is taken.

---

1. Counsel for petitioner came into this case on February 19, 1969, due to withdrawal of prior counsel. He was permitted six days by the District Court in which to review the entire case, write a complex brief, have it administratively prepared and submitted.

On September 12, 1969, respondent filed its second motion with attachments to the federal District Court of the District of Maryland.

REASONS FOR GRANTING THE WRIT.

I.

Whether the legal principles governing the interpretation of agreements between private parties apply to court-approved consent agreements? This question is of primary importance to all those fields of law in which a government agency is charged with the responsibility of administering and enforcing statutory standards and endeavors to carry out in part its responsibility through consent agreements. A few examples of the areas of law affected are: antitrust; unfair and deceptive acts and practices; securities; labor; transportation and shipping; food, drugs and cosmetics; agriculture; communications; and environmental control.

On Wednesday, September 18, 1969, counsel for petitioner finally received a copy of the documentation due to mismailing. He was given until September 24, 1969 (six days) to review over 150 pages of material, write a brief, have it prepared and filed and prepare an oral argument.

On November 10, 1969, the order of the District Court was handed down. Notice of appeal was filed by petitioner on November 13, 1969.

The record of trial was not completed until approximately November 26, 1969, and petitioner designated the record by December 2, 1969. Petitioner's brief was to be completed by December 22, 1969, (20 days after designation of record), and the printed form was to be submitted four days later.

For the first time, petitioner was unable to overcome the incredible time limitation and, although the written brief was completed on time, the printed matter was delayed for one additional week.

Thereafter, only seven days were permitted for the purpose of filing a reply brief. This time limitation was also met with success by the petitioner.

When appeal of the Circuit Court order was considered, it was realized that a misinterpretation of the court's opinion had been made. The Circuit Court discussed the subject of a 15 day time period. Petitioner assumed that this meant that petitioner must indicate a desire to appeal in 15 days. The true meaning was that the Petition for Writ of Certiorari was to be filed in 15 days. When this error of interpretation was explained to the Circuit Court judge, he allowed a seven day period during which to prepare, print and file the Petition for Writ of Certiorari.

Unlike a money judgment, these consent judgments have a continuing importance. Indeed, they play a central role in the enforcement programs of the governmental agencies operating in the above-mentioned areas of law. The consent agreement used in above-mentioned areas of law typically contain an injunctive-type prohibition to insure compliance with the statutory standards by the private party signing the decree. At the same time, because consent agreements require relatively little time and effort, the agency is able to maximize the use of its enforcement resources. Like private agreements, questions of interpretation arise and some method is needed to resolve these questions.

This Petition involves a court-approved consent agreement in a case brought under the federal Clean Air Act, 42 U. S. C. § 1857, et seq. It presents the question whether contract principles govern or ought to govern the interpretation of consent agreements. Petitioner asks this Court to rule that contract principles of interpretation apply to consent agreements and to remand this matter with instructions that these principles of interpretation be applied to the facts of this case and that additional evidence be adduced, if necessary, under the applicable contract principles of interpretation.

The District Court and Court of Appeals in interpreting the consent decree involved in this case have refused to apply the principles of law governing the interpretation of private agreements. In particular, these courts did not seek to determine the intent of the parties as this intent is determined in private agreements. In consequence, they have effectively ruled that the following principles of contract law are inapplicable to court-approved consent agreements: (1) Vagueness of expresion, indefiniteness, and uncertainty as to any essential term of an agreement prevent the creation of an enforceable contract; (2) failure to

comply with a condition renders an agreement unenforceable by the party obligated to perform the condition; (3) when there is a materially different understanding as to an essential term, an enforceable agreement is not formed; (4) when an agreement is ambiguous on its face resort may be and indeed should be made to the circumstances surrounding the agreement; and (5) when one party knows or has reason to know that the other party has in mind a particular interpretation of the agreement, the party with knowledge is bound by the interpretation of the other party even if the party with knowledge intended another interpretation.

Instead of treating the consent decree as a private agreement for purposes of interpretation, the District Court and Court of Appeals have treated the consent decree as a decree or order entered by litigation. The meaning they sought to ascertain was not that of the parties at the time of the signing of the agreement, but that of the District Court judge in accepting and approving the consent agreement. The District Court and Court of Appeals have reasoned that the relevant meaning is that attached by the District Court judge when he accepted the consent settlement and that since that meaning is "plain" to the District Court judge, that meaning prevails regardless of whether the consent decree is otherwise indefinite, the surrounding circumstances indicate that the parties had a different meaning, one of the parties did not perform an implied condition, and the government knew that the petitioner in signing the agreement intended the meaning of the decree which it now asserts.

Decree or orders after litigation and consent decrees or orders are not the same and cannot be treated the same for purposes of interpretation. In the decree entered after trial, the judge is the final arbiter of the content of the decree. He decides, if not initially, at least finally, what

the decree must include and it is his intent that governs and is sought to be captured by the language of the decree. In a consent agreement, the judge accepts or approves the agreement and incorporates it into a decree so that it may carry the weight of the judiciary and be enforced by contempt if necessary. While the judge converts the private agreement into a judicial act by endorsement and incorporation, for purposes of interpretation the consent decree remains a private agreement. The language is that of the parties and not the court. The intent sought to be captured in the agreement is that of the parties, not the court. The intent that governs the agreement is that of the parties, not the court.

These differences between a consent judgment and a judgment after litigation have been recognized by the United States Court of Appeals for the Fourth Circuit itself. *Crowe v. Cherokee Wonderland, Inc.*, 379 F. 2d 51, 54-55 (4th Cir. 1967) (a consent judgment is "no more than a judicially approved contract"; it is "subject to all contract defenses, including nonperformance and failure of consideration"). For reasons that it decided not to state, the Court of Appeals chose to ignore its own recent decision. The United States Court of Appeals for the Second Circuit has also ruled that a "consent decree represents an agreement by the parties which the court cannot expand or contract." *Artvale, Inc. v. Rugby Fabrics Corp.*, 303 F. 2d 283 (2nd Cir. 1962).

United States v. Swift, 286 U. S. 106, 114-15 (1932), has spawned a number of cases stating that a consent judgment is not a contract but a judicial act. These cases are not inconsistent with above statement. They involve modification of a decree or other questions unrelated to interpretation of a decree. *Fleming v. Huebsch Laundry Corp.*, 159 F. 2d 581 (7th Cir. 1947) (exclusable neglect);

Siebring v. Hansen, 346 F. 2d 474 (8th Cir. 1965) (contempt).

Petitioner contended that since the consent decree did not state one way or another what evidence-marshalling procedures were required or prohibited and did not state one way or another what standards were to be used or not used in determining whether petitioner committed "air pollution" within the meaning of the decree, principles governing the interpretation of private agreements were applicable and they required an examination of the circumstances surrounding the agreement. 3 Corbin on Contracts, § 542 (1963). Petitioner argued that the October 4, 1968, letter of Mr. Howard Polin, President of petitioner (see Exhibit No. 1 to the Government Brief before the Court of Appeals), in which he suggested settlement, was ample proof that he entered into the consent agreement because he felt that he had been treated unfairly by HEW and certain Selbyville residents who testified before HEW and that, in order to avoid their prejudice, he suggested a Delaware official be designated as decision maker under the decree. Petitioner reasoned that under principles governing the interpretation of private agreements an intent on the part of petitioner could be inferred which would support an interpretation of the consent decree requiring the Director (1) to rely on malodor evidence from sources other than HEW personnel and other than Selbyville residents who testified against petitioner at the HEW conference and hearing; (2) to apply Delaware substantive law in determining whether there was an "air pollution" violation under the consent decree; and (3) to apply generally accepted sampling techniques in marshalling and evaluating malodor evidence. Because the Director failed to follow these requirements, his air pollution determination was invalid, so petitioner contended.

In the alternative, petitioner claimed (1) that even if the government had a different intent, since it had reason to know of petitioner's intent, it was bound by such intent; and (2) that if the government had a different intent and did not have reason to know of petitioner's intent, it was not bound by petitioner's intent but the consent decree was unenforceable for lack of "meeting of the minds." When there is a materially different understanding as to an essential term, an enforceable agreement is not formed. 1 Corbin on Contracts, § 107 (1963).

Rather than dealing with these questions of interpretation under principles of contract law and resorting to the Polin letter of October 4, 1968, or seeking other evidence of the circumstances surrounding the consent agreement, the District Court refused "to go behind the consent decree" or consider evidence of petitioner's intent in signing the decree, as the following excerpt from pages 7-10 of the September 24, 1969 hearing shows (emphasis supplied):

> MR. CURRAN: Your Honor, may I submit the following comments for your consideration:
>
> You, firstly, mentioned some question in your mind as to why the early attachments—when I say "early," I mean probably A, B, C, and perhaps even as far as D—are made in my memorandum of law.
>
> The purpose of the submission of these first few attachments would be to guide the court regarding the preliminary thinking of both the defendant and the plaintiff in this case, your Honor.
>
> More particularly, I think that Attachment A [Polin letter of October 4, 1968 suggesting settlement] from the president of the defendant corporation——
>
> THE COURT: To his own lawyer.
>
> MR. CURRAN: (Continuing)—to his own lawyer, is

a statement of, admittedly, Your Honor, a self-serving nature, to that extent, but I think that it also serves as *a statement of intention.*

THE COURT: Oh, I do not think it does at all. I have read that. *I am not disposed to go behind the consent decree.*

Mr. Polin came in, and, in effect, what he told me at the time it was signed was that they had done all they could economically or practically, from an economic standpoint, do to cure the condition.

It either cured it, or it did not. He did not want to go through with a suit at that time.

The government was prepared to try the case. He said he would rather have this consent decree than a trial. He got the consent decree, and he understood it, and *I am not interested in going behind it, because there is no claim that there was fraud.*

I think it speaks for itself.

MR. CURRAN: Yes, Your Honor.

THE COURT: And I think that my interpretation of it has been heretofore extremely liberal in your favor. Because the original affidavit of Mr. Wilburn literally complied, but I felt that there ought to be something more substantial before I took this serious action of telling them they had to stop and go out of business.

MR. CURRAN: Yes, sir.

THE COURT: But the government was ready to go ahead; the court was ready to go ahead; and it was your client who signed the consent decree, and who agreed to the consent decree. I have always understood that Mr. Porter [prior counsel for petitioner] was in favor of it.

MR. CURRAN: Your Honor, as I say, the fact, alone, that we had to take a look at the consent decree, and Your Honor had to review it and perhaps give both the plaintiff and the defendant some guidance as to your interpretation of that decree, brought up in my mind the possibility that, if there was any question regarding the intention of the defendant, surely this early documentation would make it ultimately clear.

THE COURT: He did not expect a hearing. He was not entitled to an adversary hearing before the Delaware commission. The affidavit is perfectly clear on that.

What I said was that a man could not simply make a finding without anything in support of it. And he had to show that he had something substantial to support it.

Now, the government has offered a mass of material to support the affidavit which Mr. Wilburn made as to things that have happened since.

I want to know in what respect you feel the new material is insufficient, or what reasons you have to present to the court as to why the court should not sign the final order.

MR. CURRAN: I understand, Your Honor.

THE COURT: All right.

MR. CURRAN: Your Honor, any comments I would make, of course, would be only for guidance of the court, my thinking of the case.

I hope you understand that.

THE COURT: You are certainly entitled to state whatever you think your client is entitled to. *I have just stated that I am not going behind the consent decree.*

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MR. CURRAN: Yes, sir.

THE COURT: All right.

The Court of Appeals acted similarly. It declared that the consent decree was "plain in its terms." Opinion of Court of Appeals, p. 9. It reached this conclusion apparently because the decree was not specific and because petitioner did not "propose incorporation in the decree of any protection it may have felt necessary." Opinion of Court of Appeals, p. 9. The Court of Appeals said: "Nowhere and at no time was it intimated that any finding of air pollution was to be based upon unexpressed 'understandings' with respect to the investigative [evidence-marshalling and evaluation] procedures. Neither before the entry of the consent decree, nor when the Judge held a hearing and announced his interpretation of the decree for the guidance of the parties did Bishop disclose the existence of any 'understandings' or reservations on its part." Opinion of Court of Appeals, p. 9. Hinting some impropriety, the Court of Appeals concluded that the petitioner "cannot now ask the court to revise the decree by inserting language or to interpret it to embrace matters which, if present at all, were lurking in the recesses of Bishop's [petitioner's] corporate mind." Opinion of Court of Appeals, p. 9.

The error in this reasoning is that the document cannot be plain and unambiguous on its face with respect to the intended "air pollution" standards and evidence-marshalling and evaluation procedures when the document is totally silent on these matters. The District Court's own actions and statements defy the conclusion that the consent decree is plain. At the first hearing in March, 1969, the District Court felt the need to inform the Director what the decree required of him (66a-67a). The procedures and standards to be followed were not "plain" to the Director and he had to be "fully apprised of exactly what was expected of him under the consent decree." (66a).

Counsel for petitioner were retained subsequent to the signing of the consent decree and perhaps, as a result, they cannot fully appreciate the circumstances that led the parties to sign the decree and the District Court judge to accept it. However, in retrospect, it is clear that the decree should not have been signed by either party nor accepted by the court. This consent decree, let it be said for it needs to be said, is a monument of ambiguity and a monument to poor draftsmanship. Although its terms were in general proposed by petitioner, the government drafted the language of the decree. While petitioner must stand ready to accept responsibility for the ambiguity, the government must stand ready to accept an equal if not greater share of the responsibility. Indeed, private contract law so provides. 3 Corbin on Contracts, § 559, pp. 262-67; § 537, pp. 48-49; § 538, pp. 57-61; 64-70.

The other category of error in the reasoning of the lower courts was that they assumed petitioner anticipated that the Director would do what petitioner now claims he should not have done. They reason from this assumption that petitioner had ample opportunity to protect itself and cannot not complain. This would be true if the assumption were correct. However, it is erroneous. There is no record support for it, and a hearing on the matter would show that the assumption is erroneous.

Petitioner also urged the Court of Appeals to note that there was recently discovered evidence tending to show that the Director had been informed by the government of his obligations under the decree after its signing and that neither the Director nor the Delaware Water and Air Resources Commission agreed to act as decision maker under the consent decree. See letter dated October 21, 1969, from the Delaware Water and Air Resources Commission informing petitioner that it had not been contacted by the government prior to entry of the decree. Appellant

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Brief before the Court of Appeals, Exhibit 3, p. 36. Petitioner contended that if the Director was not informed of his obligations prior to the consent agreement or if the Director and the Commission had not consented to act as decision maker under the decree, the air pollution determination of the Director was invalid. Petitioner reasoned that the determination was invalid on several grounds; one, the failure to inform and the lack of consent rendered the decree uncertain as to an essential term (1 Corbin on Contracts, § 95, p. 394 (1963) and cases cited in footnote 2; 1 Corbin on Contracts, § 100, pp. 446-7 and cases cited in footnote 55); (*People v. William Kent Estate Co.*, 51 Cal. Rptr. 215, 217 (1st Dist. Ct. App. Cal. 1966) (uncertain meaning of the words "ordinary high-water mark" rendered judgment "to uncertain to be enforced"); and, two, the decree implicitly barred any contact or consultation between the federal government and the Director subsequent to the entry of the decree.

Petitioner requested the Court of Appeals for an opportunity to develop the facts on these points, but the court ignored this request and by doing so again refused to apply contract rules of interpretation to the consent agreement.

What the District Court and Court of Appeals has done is tantamount to what this Court prohibited in *Ward Baking v. United States*, 376 U. S. 327 (1964). In *Ward*, the Court ruled that a District Court may not enter a "consent" judgment in a civil antitrust suit without the consent of one of the parties. In disregarding the intent of petitioner in interpreting the consent decree at issue, the District Court and the Court of Appeals have imposed on petitioner terms to which it did not agree. Contrary to the ruling in *Ward*, they are enforcing a consent judgment without the consent of one of the parties.

The decisions of the lower courts in this matter are also inconsistent with the Court's decision in *United States*

v. Atlantic Refining Co., 360 U. S. 19 (1959). The Interstate Commerce Commission sought to enforce an interpretation of a consent agreement which was contrary to the intent of the parties. The Court ruled that the intent of the parties could not be disregarded notwithstanding the fact that the interpretation advanced by the Commission would have tended to have fostered enforcement objectives more than the interpretation based on the intent of the parties at the time of the consent agreement.

What the District Court and Court of Appeals have Effectively done is modify the terms of the consent decree. This they cannot do. *NLRB v. Ochoa Fertilizer Corp.*, 368 U. S. 318 (1961); *NLRB v. Brandman Iron Co.*, 368 U. S. 399 (1962); *English v. McFarland*, 285 F. 2d 267 (D. C. Cir. 1960).

The Court of Appeals' method of interpreting judicially-approved consent agreements has broad implications for the field of government regulation. It could tend to discourage consent settlements of government regulation claims and if applied retroactively as in the present case, impair the stability of existing consent agreements. It threatens to undermine a most important means of effective and efficient administration and enforcement of government regulation laws. An indication of the importance of the Court of Appeals decision can be ascertained from the fact that in calendar year 1969 one federal agency, the Federal Trade Commission, accepted over 170 consent agreements. All of these consent agreements and all prior and future consent agreements by this or any other administrative agency or court are within the reach of the rulings below.

The implications of the lower court decisions for consent agreements of administrative agencies such as the Federal Trade Commission, National Labor Relations Board and the Securities Exchange Commission may be

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even more important. As applied to administrative orders, the rulings below will mean that an administrative agency will be able to place its own interpretation on a consent agreement in accordance with its view of what is appropriate and in the public interest at the time of interpretation without regard for the intent of the private party at the time of the signing of the agreement. In the case of administrative orders, the agency is both the other party and the initial adjudicator of any questions of compliance with and interpretation of the decree. The judiciary is not available to act as an independent arbiter of interpretation disputes except upon judicial review.

The Supreme Court has on a number of occasions granted certiorari in order to consider questions relating to the interpretation, modification and enforcement of injunctive-type decrees or consent agreements of the federal courts and federal independent regulatory agencies.

In *Jantzen & Co. v. FTC*, 386 U. S. 228 (1967), the Court was presented with the question of the effect of the Finality Act, Act of July 23, 1959, 73 Stat. 243, upon outstanding Federal Trade Commission litigated orders and consent agreements under Section 11 of the Clayton Act, 38 Stat. 734. The respondent claimed that the Finality Act repealed the enforcement provision of Section 11 of the Clayton Act, 15 U. S. C. § 21, and that orders entered into prior to the enactment of the Fnality Act were not enforceable. The Court of appeals agreed with respondent. Because the appellate court ruling threatened to upset the enforcement potency of almost 400 Federal Trade Commission orders, the Court granted certiorari.

The question posed in the present case is at least as important to the legal system as the question in the *Jantzen* case. Like the *Jantzen* case, this matter involves the effectiveness of injunctive-type orders. The decisions of the District Court and Court of Appeals below threaten

retroactively to change the implicit basis upon which private parties have relied in entering into a consent settlement and, in consequence, threaten to generate uncertainty, confusion and a plethora of litigation or requests for advisory opinions or declaratory judgments. The lower courts method of interpreting consent agreements also threatens to curtail the attractiveness of consent settlements to private parties and, to this extent, threatens to destroy a useful enforcement mechanism. Thus, the potential impact of the rulings below both qualitatively and quantitatively is certainly the equal of that in *Jantzen*.

Who could argue with the proposition that consent agreements are as critical to antitrust enforcement as private antitrust damage actions. The Court recently granted certiorari in *Perma Life Mufflers v. International Parts Corp.*, 392 U. S. 134, 136 (1968), because "these rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States." It follows that a ruling threatening the effectiveness of consent agreements as a means of antitrust enforcement also deserves consideration by the Court. Since the rulings of the lower courts in this case threaten the effectiveness of consent agreements in more than the area of antitrust enforcement, it also follows that the Court should grant this Petition for Certiorari.

Underscoring the importance it attaches to injunctive-type orders in the enforcement work of federal independent regulatory agencies, the Court has granted certiorari to consider the extent to which such agencies may enter cease and desist orders prohibiting acts and practices other than the precise unlawful act or practice found to have been committed after evidentiary hearing, *NLRB v. Express Publishing Co.*, 312 U. S. 426 (1941), the question whether

the Federal Trade Commission can prohibit entirely the use of a deceptive name when the use of qualifying language with the name will completely remove the deception, *Siegel Co. v. FTC*, 327 U. S. 608 (1946), the scope and interpretation of Federal Trade Commission cease and desist orders under Section 2(a) the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13, *Ruberroid v. FTC*, 343 U. S. 470 (1952), and similar questions of scope and interpretation under Section 2(c) of the Robinson-Patman Act, *Broch & Co. v. FTC*, 368 U. S. 360 (1962). The questions of interpretation presented in these cases are surely of no greater importance than the ones presented in this case. None of those cases involved, as this case does, the applicability of an entire set of principles in resolving disputes over interpretation of judgments.

The Court has also recognized the importance of questions relating to the interpretation, modification and enforcement of injunctive judgments in appeal cases. *Swift & Co. v. United States*, 276 U. S. 311 (1928) (consent decree in antitrust suit); *Aluminum Co. of America v. United States*, 302 U. S. 230 (1937); (consent decree in antitrust suit); *Chrysler Corp. v. United States*, 316 U. S. 556 (1942) (consent decree in antitrust case); *Atlantic Refining Co. v. ICC*, 360 U. S. 19 (1959) (consent decree settling an illegal transportation rebate suit under the Interstate Commerce Act and the Elkins Act); *United States v. United Shoe Machinery Corp.*, 391 U. S. 244 (1968) (consent decree in antitrust suit).

II.

Whether thirty-one instances of malodor over a consecutive fourteen-week observation period constitutes as a matter of law a violation of the federal Clean Air Act, 42 U. S. C. § 1857, et seq., without regard for seasonal varia-

tions in relevant meteorological conditions (*e.g.*, wind direction and speed, temperature, humidity, and precipitation), the duraton of each malodor, the degree of offensiveness of each malodor, and the geographic pervasiveness of each malodor? Petitioner requests that the Court grant certiorari to consider this question of substantial importance.

The District Court ruled that "thirty-one reports of malodorous conditions in the Selbyville, Delaware area, an average of more than two occurrences per week" during the period May 19, 1969 to August 24, 1969, constituted an air pollution violation of the consent decree (160a).[2] The District Court disregarded the duration of each reported malodor, the degree of offensiveness of each reported malodor, and the geographic pervasiveness of each malodor reported. Relying solely on the frequency of reported malodors, the court specifically ruled irrelevant all variations in meteorological conditions. It stated that "what is required is a recurring phenomenon or series of instances; certainly not every day or necessary every week, *if the weather conditions militate against it,* but recurring with more than isolated instances *when the weather conditions tend to carry any pollution from defendant's* [petitioner's] *plant into Delaware.*" (158a) (Emphasis added).

The Court of Appeals treated the District Court determination that petitioner had committed an air pollution violation as a factual one and treated petitioner's contentions as "in substance an attack of the sufficiency of the evidence upon which the finding of air pollution was based." Opinion of Court of Appeals, p. 11. Noting that the Dis-

2. The consent decree provides for the closing of petitioner's plant upon a determination by the Director, Air Pollution Control Division, State of Delaware Water and Air Resources Commission, that petitioner has committed "malodorous air pollution" in the State of Delaware. The full text of the consent decree can be found in the record (43a).

trict Court judge found that the government had adduced "sufficient evidence to show that Bishop [petitioner] continues to pollute the air," the Court of Appeals ruled that "certainly the factual finding, so carefully arrived at, cannot be deemed clearly erroneous." Opinion of Court of Appeals, p. 11.

The Court of Appeals has mischaracterized the issue. Petitioner does not and has not challenged the factual finding of the Director and the District Court that during the period May 19, 1969 to August 24, 1969, there were 31 reports of malodors in the Selbyville, Delaware area. Petitioner raises a question of law: Whether the Director and the District Court in making the air pollution determination should have taken into account factors other than the frequency of reported malodors.[3]

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3. The Court of Appeals passing reference to a "horrible" and "nauseating" odor (see opinion, p. 12) is misplaced. The source of this characterization is the 1965 letter from a Delaware air pollution official to HEW. Opinion of Court of Appeals p. 3, n. 1. This characterization, even if deemed to be true, is irrelevant to this case for two reasons. First, it refers to a time prior to the date when petitioner eliminated the use of most of the odorous materials in its plant so as to abate the alleged air pollution in Selbyville. In this connection, it should be noted that the Court of Appeals' innuendos that petitioner was recalcitrant and uncooperative are totally false. This characterization has been sought to be placed upon petitioner solely because it was unwilling to invest large sums in totally untried air pollution control systems and devices. After it cut back on odorous materials, petitioner invited government officials to come to the plant and see the results for themselves. They did not come. The second reason why the Court of Appeals' reference to "horrible" odors is inappropriate is this. The consent decree established an evidentiary cut-off date of November 1, 1968.

Noting that the District Court judge at the first hearing "explained, with no caveat whatever from Bishop [petitioner], the type and guantum of evidence he felt necessary" (Opinion of Court of Appeals p. 11), the Court of Appeals implicitly charged petitioner with a waiver of its objections to the District Court's reliance on the thirty-one reports of malodors. The record shows, however, that the District Court's explanation of the relevant kind of evidence and relevant criteria was open-ended (67a).

As the Second Circuit Court of Appeals declared in *SEC v. Texas Gulf Sulphur Co.*, 401 F. 2d 833, 850 (2d Cir. 1968), "our disagreement with the district judge on the issue does not, then, go to his findings of basic fact, as to which the 'clearly erroneous' rule would apply, but to his understanding of the legal standard applicable to them." And as it stated in *In re Hygrade Envelope Corp.*, 366 F. 2d 584, 588-89 (2d Cir. 1966): "To be sure, an appellate court must respect findings of a trial judge as to what in fact happened and in addition should give due weight to his superior opportunity to acquire the true feel of the case. But when the issue is his application of a legal standard to facts undisputed or reasonably found, reversal is not limited to results that are 'clearly erroneous'; it is enough that the appellate court should be convinced, as we are here, that the result does not jibe with the applicable rule of law."

The record tends to show and additional evidence would clearly show that when such factors as seasonal variations in relevant meteorological conditions, the duration of each malodor, the degree of offsensiveness of each odor, and the geographic pervasiveness of each malodor are considered, the malodors reaching Selbyville area from petitioner's plant are *de minimis*. They do not interfere with the enjoyment of life or property of the Selbyville area residents.

Petitioner does not ask this Court to evaluate the relevant evidence already in the record but asks the Court (1) to rule that the above-mentioned factors should not have been disregarded by the courts below; (2) to rule that these factors must as a matter of law be taken into account in determining whether an air pollution violation has been committed; and (3) to remand the matter for the purpose of taking whatever additional evidence the lower courts

deem appropriate under the legal standard announced by this Court.

The Federal Clean Air Act prohibits but does not define "air pollution". This is the first case under the Act and thus there are no case precedents to look to for guidance. However, we are not without guidance. Indeed, the recently enacted body of state air pollution legislation is especially useful. All of the forty-four states which have passed air pollution legislation define "air pollution" and set out the factor that must be considered. This state legislation is of compelling weight under the federal Clean Air Act because Congress in enacting the Clean Air Act refrained from defining "air pollution" so that the states could take the lead in this respect. The Clean Air Act contemplated that primary enforcement responsibility would rest with the states, the federal government providing encouragement, guidance, funds, and HEW know-how. The Act provides that the Secretary of HEW shall "encourage the enactment of improved and, so far as practicable in the light of varying conditions and needs, uniform State and local laws relating to the prevention and control of air pollution." 42 U. S. C. § 1857a(a) (1969). HEW is required to conduct research into the harmful characteristics of various kinds of air pollutants and to issue its findings in the form of what the Act describes as "criteria." HEW has done this for sulfur oxides and particulates.[4] The Clean Air Act requires that "State standards" be "consistent with the air quality criteria" established by HEW. 42 U. S. C. § 1857d(b), § 1857d(c) (1969). In no event can state standards be less demanding than any federal standards set up. 42 U. S. C. § 1857d-1 (1969). This statutory

4. Air Quality Criteria for Particulate Matter, U. S. Department of Health, Education and Welfare, AP-49. HEW has as yet issued only fragmentary criteria on odor-carrying air contaminants indicating only that odors in sufficient quantities are potentially harmful. *Id.* at 103.

scheme means that federal precedents will be of great weight under state legislation and state precedents will also be of great weight under the federal Clean Air Act. What this means here is that, in the absence of a federal definition and federal precedents, state standards are of compelling influence.

As of 1968, forty-four states had passed air pollution legislation. Unlike the federal Clean Air Act, all of the state legislation defines "air pollution." Of particular importance to this case is the fact that all of the state legislation defines "air pollution" in terms of quantity, quality, duration, and injurious effects. See compilation of air pollution control legislation in 9 Bost. Col. Ind. L. Rev. 712, 713-15 (1968).[5] The statute in Delaware, the state in which the allegedly affected area is located, is representative. "Air pollution," as defined in Delaware's air pollution act, Title 7, Section 6202, of the Delaware Code (emphasis supplied), means "the presence in the outdoor atmosphere of one or more air contaminants in *sufficient quantities* and of such *characteristics* and *duration*" as to have one of three categories of consequences: (1) injury to "human, plant or animal life"; (2) injury to "property"; (3) "unreasonably interferes with the enjoyment of life or property".[6] This case involves the last category of effect, *viz.*, an unreasonable interference with the enjoyment of life or property by the residents of the Selbyville, Delaware area.

Section 6203(b) of Title 7 of the Delaware Code is representative of similar provisions in the other state air pollution acts. It requires the state agency charged with

5. California and Massachusetts are not exceptions, as it might appear from footnote 7 on p. 713 of this law review comment. See Cal. Health and Safety Code § 24243 (West 1967); Mass. Gen. Laws Ann. ch. 11, § 31C (Supp. 1969).

6. There are no reported cases under this statute or the other state air pollution acts.

enforcement responsibility to "give due recognition to the fact that the quantity or characteristics of air contaminants or their duration of their presence in the atmosphere, which may cause air pollution in one area of the state, may cause less air pollution or *not cause any pollution in another area of the State.*" (Emphasis supplied.) The same section, accordingly, requires the state air pollution control agency "to take into consideration" "such factors among others found by it to be proper and just, as existing physical conditions, zoning classifications, topography and prevailing wind directions and speeds."

The District Court and the Court of Appeals, in upholding the Director's determination that petitioner committed an air pollution violation, erroneously relied on a single factor: the frequency of malodors—thirty-one reports of malodors over a fourteen-week period. They have disregarded all other relevant factors.

As the Court of Appeals stated, "pollution is a severe and increasing problem of which the courts and other branches of government have become acutely conscious." Opinion of Court of Appeals, p. 11. This case represents a test case for the government. It is one of first impression in an increasingly important area of law. It is no doubt only the first of many cases to come under federal and state air pollution legislation. Unfortunately, the decision of the courts below threaten to begin the development of this embryonic body of law on an unsound footing and send it off in the wrong direction. The rulings of the courts below threaten to cause alarm, albeit unnecessary. Under a standard of thirty-one malodors per fourteen-week period, most of the plants in the country and a substantial number of small businesses would be guilty of an air pollution violation.

Petitioner asks this Court to grant certiorari in this case to prevent stultification of the development of air

pollution law. It does not ask the Court to set up precise principles. That is not necessary in this case. Rather, petitioner requests that this Court declare that factors other than merely malodor frequency must be weighed in determining an air pollution violation. The Court has granted certiorari in similar circumstances. See, *e.g.*, *Musicians Federation v. Wittstein*, 379 U. S. 171, 175 (1964) ("the question being an important one of first impression under the LMRDA"—Labor-Management Reporting and Disclosure Act, 73 Stat. 519, 522, 29 U. S. C. § 411(a)(3) (1958 ed., Supp. V).

III.

Whether a series of unreasonable time limitations imposed upon petitioner by the federal District Court and federal Circuit Court are such as to amount to a deprivation of due process of law.

Throughout this entire procedure, petitioner's counsel has been under frantic time pressure apparently because of the logical but incorrect theory by the federal District Court and the Court of Appeals that appellant was attempting to delay the procedure (62a). On February 19, 1969, counsel for petitioner was first consulted since prior counsel had chosen to withdraw. Counsel had six days to review the entire case ab initio, write a complex brief and prepare for oral presentation. The government, having sustained a loss at that stage, enjoyed a three month period of inaction and a four month follow-up period to casually gather evidence. The government filed its next motion on September 12, 1969. This document was mismailed and, therefore, not received by counsel until September 18, 1969. In desperation, petitioner's counsel called the Federal District Court judge requesting a few days to

BLEED THROUGH, POOR COPY

prepare. This request was denied and the hearing was held on September 24, 1969. In six days, counsel was forced review complex government documentation of over 150 pages, write a brief, have it administratively prepared and make ready for oral argument.

On November 10, 1969, the Federal District Court's order was entered. A conference was held in Judge Thomsen's chambers requiring that a strict time schedule be instituted regarding appeal. In accordance with prior procedure, the onus fell upon petitioner.

The transcript of trial was received by petitioner's counsel on or about November 26, 1969 and a designation of that record was accomplished by December 2, 1969. Thereafter, petitioner had 20 days during which to write and administratively prepare a complete brief and appendix to be submitted to the Court of Appeals; for a reply brief, it had 7 days.

Emphasis is placed upon administrative preparation because petitioner's counsel, John Paul Curran, Esquire, is associated with a small law firm without the extensive facilities available to a metropolitan office.

Then appellant was permitted four days to submit the printed brief which became an impossibility.

These intolerable conditions continued. Once the Court of Appeals affirmed the lower court, they wrote opinion and entered an order which was misinterpreted by counsel. The subject of 15 days was discussed by the Court of Appeals as follows: "It is further ordered that if appellant applies to the Supreme Court for certiorari within 15 days from the filing of this opinion, the injunctive order of the District Court will be stayed . . ." Petitioner's counsel interpreted this to mean that they were required to indicate their position in a 15 day period. On March 16, 1970 counsel called the Clerk of the Fourth

Circuit and informed him that the petitioner had chosen to appeal. This was supported by a letter dated March 17, 1970. The transcript was forwarded. On March 20, 1970 at 4:15 P. M., petitioner's counsel received a call from government counsel indicating that the government believed that the formal printed Petition for Writ of Certiorari had to be filed within 15 days in order to stay the injunction. At 4:45 P. M., petitioner's counsel called the Clerk of the Fourth Circuit but that Clerk did not know what the correct interpretation should be. As it was too late to call Judge Sobeloff that day, a call was placed to him on Monday morning, March 23, 1970 at 9:45 A. M. He verified the government's interpretation and although counsel requested 30 days during which to file the Petition for Writ of Certiorari, he was granted only seven days.

This conduct relating to petitioner must be compared to the conduct as applied to the government. The consent decree was signed on November 1, 1968. Three months later, the government filed a motion. When this motion was denied, the government did nothing until May of 1969 and then filed its next motion in September of 1969. This six month delay belongs solely to the government.

Yet throughout this procedure, it is implicit that petitioner is somehow being assumed to be the delaying party. Due to this situation, petitioner's counsel asserts to this Honorable Court that it was a physical, mental and emotional impossibility to competently represent their client and provide that client with the complete legal services to which it was entitled. Although no single time limitation is, in itself, determinative, we are faced with a situation where cumulative pressures have contributed to a denial of due process of law. The petitioner relies upon the decision of *Chandler v. Fretag*, 348 U. S. 3, 9-10 (1954), to support the propositions stated herein.

CONCLUSION.

Because this case presents questions of substantial importance and because the decisions of the Court of Appeals and District Court are in conflict with the decisions of this Court, it is submitted that the Petition should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

March 30, 1970.

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT.

No. 14148.

UNITED STATES OF AMERICA,

Appellee,

v.

BISHOP PROCESSING COMPANY, A BODY CORPORATE OF THE STATE OF MARYLAND,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. ROSZEL C. THOMSEN, DISTRICT JUDGE.

(Argued February 4, 1970—Decided March 3, 1970.)

Before SOBELOFF, BOREMAN and BRYAN, *Circuit Judges.*

John Paul Curran and Ralph J. Savarese (Lord, Ackerman & Mulligan on brief) for Appellant, and Walter Kiechel, Jr., Deputy Assistant Attorney General, (Shiro Kashiwa, Assistant Attorney General, and Robert S. Lynch, Attorney, Department of Justice, and Stephen H. Sachs, United States Attorney, and J. Frederick Motz, Assistant United States Attorney, on brief) for Appellee.

SOBELOFF, *Circuit Judge*:

This appeal is the most recent chapter in a long series of proceedings, in and out of court, stretching over more than a decade. The states of Delaware and Maryland, later joined by the federal government, have been endeavoring to bring relief to affected communities from alleged air pollution stemming from the appellant's rendering plant.

From approximately 1959 to 1965 the two states engaged in futile efforts to induce Bishop Processing Company, operator of the rendering and animal reduction plant located near Bishop, Maryland, to abate the malodorous air pollution which allegedly moves across the state line to pollute the air of nearby Selbyville, Delaware. Finally in 1965, the United States Secretary of Health, Education and Welfare received a request from the Delaware authorities to "take the necessary action under P. L. 88-206, section 5 (the Clean Air Act, 42 U. S. C. § 1857, *et seq.*), to secure the abatement of the air pollution problem."[1] In response

1. The letter was as follows:

The State of Delaware has been working with the State of Maryland over the past six (6) years in an attempt to correct an interstate air pollution problem which endangers the health or welfare of the people in the Selbyville, Delaware, area. No substantial progress has been made in spite of efforts on the part of the Maryland State Department of Health and the Delaware State Board of Health to resolve the problem. The offender is the Bishop Processing Company located in Bishop, Maryland. An obnoxious and nauseating odor emanates from the plant of this Company in the process of rendering feathers, offal, bone and grease. The citizens of Selbyville, Delaware, describe this odor as a "horrible strench."

The State Board of Health, Air Pollution Authority of Delaware, with the concurrence of the Governor, respectfully requests the Secretary of the Department of Health, Education and Welfare take the necessary action under P. L. 88-206, section 5, to secure abatement of this air pollution problem. Your prompt attention in relation to this matter will be deeply appreciated.

to this request the Secretary initiated hearing procedures provided in the Act.

As recited in the District Judge's opinion,[2] the initial step was a conference held in Selbyville on November 9 and 10, 1965. The parties attending the conference represented, as specified in the Act, the air pollution control agencies of the states and municipalities concerned. The Secretary forwarded to the participants a summary of the conference discussions and recommendations, which called upon Maryland to require Bishop to take certain remedial action by September 1, 1966.

Since the recommended remedial action was not taken, the Secretary instituted the next step envisioned in the Act, by calling a public hearing which was held on May 17 and 18, 1967. At this hearing Bishop was represented by counsel who extensively cross-examined witnesses and otherwise fully participated. The hearing board forwarded its findings and recommendations to the Secretary, who in turn transmitted them to Bishop with the instruction to abate the pollution not later than December 1, 1967 by installing adequate and effective pollution control systems.[3]

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2. United States v. Bishop Processing Co., 287 F. Supp. 624 (D. C. Md. 1968).

3. "NOTICE

There are attached hereto, and made a part hereof, the Findings, Conclusions, and Recommendations, dated May 19, 1967, of the Hearing Board convened pursuant to the provisions of section 105(e)(1) of the Clean Air Act [42 U. S. C. 1857d(e)(1)] which held a public hearing in the matter of the interstate air pollution in the Selbyville, Delaware-Bishop, Maryland area.

"In accordance with section 105(e)(3) of the Clean Air Act [42 U. S. C. 1857d(e)(3)] the Bishop Processing Company, Bishop, Maryland is hereby notified and directed to cease and desist from discharging malodorous air pollutants and to abate such air pollution not later than December 1, 1967, by the installation, completion and placing into operation adequate and effective control systems and devices, as recommended by the Hearing Board."

This step also proving fruitless, the Secretary, in the exercise of the authority granted him in section 1857d,[4] filed a complaint on March 7, 1968 in the United States District Court for Maryland seeking to enjoin Bishop from discharging malodorous air pollutants. There followed discussions between the parties and on October 4, 1968 the appellant proposed settlement of the case, specifying the terms he would accept. On November 1, 1968, the action then pending was disposed of by settlement. A consent decree was entered in which Bishop agreed, in the precise terms it had suggested, to "cease all manufacturing and processing" upon the "filing of an affidavit by the Director, Air Pollution Control Division, State of Delaware Water and Air Resources Commission, stating that the defendant is discharging malodorous air pollution reaching the State of Delaware * * *."[5]

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4. See specifically, 42 U. S. C. § 1857d(g)(1) and § 1857d(h).

5. This cause having come on for pretrial conference, and the defendant having consented to the following order, it is hereby ordered, decreed and adjudged that:

1. The defendant, Bishop Processing Company, and its Officers, agents, servants, employees, successors and assigns, and any and all persons in active consort or participation with them are permanently enjoined and restrained from discharging malodorous air pollutants into the State of Delaware.

2. The Court retains jurisdiction of this suit for the purpose of enforcing this decree in the following manner:

a) Upon the plaintiff's filing of an affidavit by the Director, Air Pollution Control Division, State of Delaware Water and Air Resources Commission, stating that the defendant is discharging malodorous air pollution reaching the State of Delaware, the Court will forthwith order the defendant to cease all manufacturing and processing operations in defendant's rendering and animal reduction plant located near Bishop, Maryland.

b) The defendant shall have no recourse or appeal from the determination of the Director, Air Pollution Control Division, State of Delaware Water and Air Resources Commission, tendered to the Court in the matter described in subparagraph a) above.

The Director accordingly instituted a surveillance program to determine to what extent, if any, the obnoxious odors persisted and reached Delaware. Odors logs were kept at the instance of the Director and he made personal observations. On this basis the Director found that Bishop had been recurringly discharging malodorous air pollutants which reached the State of Delaware since November 1, 1968. These findings and conclusions the Director embodied in an affidavit.

Based upon this affidavit and pursuant to the consent decree, the United States moved for an order directing the defendant to cease operations. A hearing on this motion was held on March 3 and 4, 1968, in which the District Judge declared that the "Court would prefer to have more evidence" that Bishop is engaging in air pollution, and announced his interpretation of the consent decree "for the guidance of * * * members of the staff who may be participating in any further investigations." In this way the judge indicated to the parties the type of evidence he would consider requisite for a showing of air pollution upon which an order could be based.

On September 12, 1969, the United States filed a second motion accompanied by affidavits in compliance with the consent decree and the court prescribed evidentiary requirements. After a further hearing, the court found the evidence substantial and entered the order to cease operations. The appeal is from this order.

The appellant presses the contention that the District Court erred in ruling that the Director performed his duties in accordance with the consent decree. Bishop argues that the decree was entered into with various "understandings" which contemplated certain procedures to be followed by the Director in his investigation. Specifically, Bishop asserts its "understandings" that (1) the Director was not to rely on citizen complaints or on testimony of representa-

tives of the federal government in determining whether it committed air pollution and, (2) that the Director's finding was to be based upon "generally accepted sampling techniques."

Whatever merit this argument might have in other circumstances, it must fail here. The consent decree is plain in its terms. Nowhere and at no time was it intimated that any finding of air pollution was to be based upon unexpressed "understandings" with respect to the investigative procedures. Neither before the entry of the consent decree, nor when the judge held a hearing and announced his interpretation of the decree for the guidance of the parties did Bishop disclose the existence of any "understandings" or reservations on its part.

Bishop had ample opportunity to propose incorporation in the decree of any protection it may have felt necessary, and to object to procedures it deemed contrary to its understanding of the decree's terms. It cannot now ask the court to revise the decree by inserting language or to interpret it to embrace matters which, if present at all, were lurking in the recesses of Bishop's corporate mind.

Apparently as an afterthought, appellant now complains that the government witnesses lacked objectivity. It is contended that information supplied by employees of the United States should not have been considered, for the federal government is an adversary in this proceeding. It was argued to us that appellant had faith in the Delaware Director but not in the federal officials and that appellant's expectation was that the Delaware official would not rely upon federal representations made to him. There are many examples of administrative agencies that act upon the testimony of their investigators. It does not derogate from the investigators' objectivity that the agency by whom they are employed has the regulatory function. Of course the fact finder must consider every witness' rela-

tionship to the parties and to the subject matter, but a government employee is not disqualified as a witness by reason of his employment.[6]

But the issue is a false one here, for the Director, whom the appellant chose to determine the facts, did not exceed the terms of his authority in the consent decree. Like considerations apply to appellant's belated challenge to citizens' complaints.

Bishop's further contentions, variously repeated, are in substance an attack on the sufficiency of the evidence upon which the finding of air pollution was based. As above stated, at the first hearing the District Judge explained, with no caveat whatever from Bishop, the type and quantum of evidence he felt was necessary. After a second hearing he found that the Government had complied with his directions and adduced sufficient evidence to show that Bishop continues to pollute the air. Certainly the factual findings, so carefully arrived at, cannot be deemed clearly erroneous.

Pollution is a severe and increasing problem of which the courts and other branches of government have become acutely conscious. The residents of the area in the neighborhood of Bishop's plant have the right to demand that the air they breathe shall not be defiled by what witnesses described as a "horrible" and "nauseating" stench. The afflicted neighbors have striven long and in vain to vindicate that right. Relief is due them now.

The appellant cannot complain that the decree came suddenly, unexpectedly, or without awareness of the com-

6. In dealing with questions concerning the procedures to be followed by administrative agencies, it has been consistently held that rigid rules of evidence observed in courts of law may be relaxed in administrative proceedings. Trade Commission v. Cement Institute, 333 U. S. 683, 705-06 (1948). Opp Cotton Mills v. Administrator, 312 U. S. 126, 755 (1941); Rosedale Coal Co. v. Director of U. S. Bureau of Mines, 247 F. 2d 299 (4th Cir. 1957).

plaints, nor that it was denied full opportunity to meet them. In light of the entire history we perceive no inequity.

This court is not unmindful of the serious consequences to appellant's business from the District Court's order. It is, however, precisely the remedy which Bishop suggested and agreed to in order to avoid a trial, and seems inescapable since it has over a long period failed to take effective measures to solve the problem.

The order of the District Court is affirmed.

It is further ordered that if appellant applies to the Supreme Court for certiorari within 15 days from the filing of this opinion, the injunctive order of the District Court will be further stayed until final disposition of the case in the Supreme Court; otherwise the District Court's injunction shall become operative.

Affirmed.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND.

CIVIL No. 19274.

UNITED STATES OF AMERICA

v.

BISHOP PROCESSING COMPANY, A BODY CORPORATE OF THE STATE OF MARYLAND

OPINION.

Filed: October 27, 1969.

Stephen H. Sachs, United States Attorney, J. Frederick Motz, Assistant United States Attorney, of Baltimore, Maryland, and Walter Kiechel, Jr., Attorney, Department of Justice, of Washington, D. C., for plaintiff.

Arnold M. Weiner, of Baltimore, Maryland, and John Paul Curran, of Philadelphia, Pennsylvania, for defendant.

THOMSEN, *Chief Judge*

After the defendant herein had failed to enjoin the filing of this suit, see *Bishop Processing Co. v. Gardner*, 275 F. Supp. 780 (D. Md. 1967), the complaint herein was filed on March 7, 1968. Defendant's motion to dismiss the complaint was denied, with a reported opinion, *United States v. Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968).

At a pretrial conference a stipulation was filed, signed by the attorneys for the United States, by the attorneys for

the defendant, Bishop Processing Company, and by Harold Polin, President of Bishop Processing Company, consenting to the entry of the following Consent Decree:

"This cause having come on for pretrial conference, and the defendant having consented to the following order, it is hereby ordered, decreed and adjudged that:

"1. The defendant, Bishop Processing Company, and its officers, agents, servants, employees, successors and assigns, and any and all persons in active concert or participation with them are permanently enjoined and restrained from discharging malodorous air pollutants into the State of Delaware.

"2. The Court retains jurisdiction of this suit for the purpose of enforcing this decree in the following manner:

"a) Upon the plaintiff's filing of an affidavit with the Court by the Director, Air Pollution Control Division, State of Delaware Water and Air Resources Commission, stating that the defendant is discharging malodorous air pollution reaching the State of Delaware, the Court will forthwith order the defendant to cease all manufacturing and processing operations in defendant's rendering and animal reduction plant located near Bishop, Maryland.

"b) The defendant shall have no recourse or appeal from the determination of the Director, Air Pollution Control Division, State of Delaware Water and Air Resources Commission, tendered to the Court in the matter described in subparagraph (a) above.

November 1, 1968"

Before the Consent Decree was signed, the Court asked Mr. Polin whether he had discussed the matter with other Directors of the Company and whether he was authorized to sign the stipulation on behalf of the Company, to both of which questions he replied "Yes, sir".

On February 7, 1969, plaintiff filed a "Motion for Order" attaching two affidavits of James T. Wilburn, Director of the Air Pollution Control Division of the Delaware Water and Air Resources Commission, and praying that the Court order the defendant, in accordance with the Decree, to cease all manufacturing and processing operations in defendant's rendering and animal reduction plant located near Bishop, Maryland.

After a hearing on that motion, the Court made the following statement:

> "It appears that Mr. Wilburn did not fully realize, or was not fully apprised of, exactly what was expected of him under the consent decree.
>
> "The Court has no question about Mr. Wilburn's good faith.
>
> "The Court does feel that, in view of all the circumstances, the Court would prefer to have more evidence in the case than we have now, before deciding the case, in view of the fact that defendants are arguing that there must be substantial evidence in the record taken as a whole to support the decision.
>
> "The Court is satisfied that the determination by Mr. Wilburn as Director of the Air Pollution Control Division did not require him to have an adversary hearing. However confident the Court is in his good faith, the Court is not prepared to rule at this time whether there is not a minimum amount of evidence or facts which must be used as the basis for his determination.

"Therefore, I am making this interpretation of the consent decree for the guidance of Mr. Wilburn, Mr. Lawrence, and any other members of the staff who may be participating in any further investigations.

"The key words are whether defendant is discharging malodorous air pollution reaching the State of Delaware. The time period is after November 1, 1968.

"What is required more than a single instance, or one or two isolated instances, over a considerable period of time.

"Rather, what is required is a recurring phenomenon or series of instances; certainly not every day or necessarily every week, if the weather conditions militate against it, but recurring with more than isolated instances when the weather conditions tend to carry any pollution from defendant's plant into Delaware.

"The Director's determination may be based upon his own personal observation, or personal observation by one or more members of his staff, or odor logs, or other similar records. The sufficiency of the other proof depends necessarily upon the number of persons, the certainty of their recollection as to dates, and other criteria.

"The evidence which is already admitted will be considered at the conclusion of the adjourned hearing, and a further hearing may be held at any time that counsel for the government, after consultation with Mr. Wilburn, believes that sufficient evidence may be submitted, either by further testimony from him or a further affidavit from him, supported by the evidence I have suggested in the form of affidavits, written records, reports, et cetera.

BLEED THROUGH POOR COPY

"When such material is available, counsel for the government may ask the Court to set the case for hearing promptly.

"I will set it as fast I can set it, in fairness to counsel for the defendants."

Thereafter, on September 12, 1969, the government filed a second Motion for Order, accompanied by a detailed affidavit of Hugh J. Menghi, staff meteorologist of the Air Pollution Control Division of the Delaware Water and Air Resources Commission, which was supported by various records. No affidavit of the Director of the Division accompanied the motion.

Defendant filed a memorandum of law, with affidavits, in opposition to plaintiff's motion.

A hearing was held, in which the Court noted that plaintiff's motion was not supported by an affidavit of the Director of the Air Pollution Control Division of the Delaware Water and Air Resources Commission, as required by the decree of November 1, 1968, and the Court's memorandum of March 4, 1969, quoted above.

Thereafter, plaintiff filed the following affidavit by Norman E. Thomas, Acting Director of the Air Pollution Control Division of the Delaware Water and Air Resources Commission:

"That based upon the facts and supporting information contained in the affidavit of September 5, 1969, executed by Hugh J. Menghi, which affidavit was prepared and executed under my supervision, I state that the defendant, Bishop Processing Company, is discharging malodorous air pollution reaching the State of Delaware."

Defendant then filed a supplemental memorandum of law with two additional affidavits, which, like the former

affidavits submitted by defendant, contradict the evidence upon which the Acting Director relied.

The additional affidavit submitted by the plaintiff fully satisfies the requirements of the Consent Decree and its interpretation by this Court on March 4, 1969. The determination of the Acting Director quoted above is supported by substantial evidence on the record considered as a whole. *Laws v. Celebrezze*, 368 F. 2d 640 (4 Cir. 1966); *O'Leary v. Brown-Pacific-Maxon*, 340 U. S. 505 (1951). The Menghi affidavit, referred to in the affidavit and determination of the Acting Director, and made under his supervision, states that from May 19, 1969 to August 24, 1969, there had been thirty-one reports of malodorous conditions in the Selbyville, Delaware area, an average of more than two occurrences per week. Those reports, if accepted and believed by the Acting Director, provided a substantial basis of evidence from which he could reasonably infer that the Bishop Processing Company is discharging malodorous air pollution which is reaching the State of Delaware. The Director was not required to hold an evidentiary hearing.

The Court will enter an order directing the defendant to cease all manufacturing and processing operations in defendant's rendering and animal reduction plant located near Bishop, Maryland. If counsel are unable to agree upon the form and timing of the injunction, the Court will settle those matters one week from the date this opinion is filed.

ROSZEL C. THOMSEN

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND.

CIVIL No. 19274.

THE UNITED STATES OF AMERICA,
Plaintiff,

v.

BISHOP PROCESSING COMPANY, A BODY CORPORATE OF THE STATE OF MARYLAND,
Defendant.

ORDER.

This Court having retained jurisdiction of this suit for the purpose of enforcing the Consent Decree entered on November 1, 1968, and plaintiff having filed in accordance with that Decree affidavits dated September 5, 1969, and September 24, 1969, and supporting documents showing that the defendant is discharging malodorous air pollution reaching the State of Delaware, and the Court in its opinion filed October 27, 1969, having held that these affidavits fully satisfy the requirements of the Decree,

It is hereby Ordered

that the defendant, Bishop Processing Company, cease all manufacturing and processing operations in defendant's rendering and animal reduction plant located near Bishop, Maryland, on or before February 16, 1970.

ROSZEL C. THOMSEN,
Chief Judge, U. S. District Court.

Date: November 10, 1969

APPENDIX B.

Clean Air Act, 42 U. S. C. § 1857, et seq.

§ 1857a. Cooperative activities—Interstate cooperation; uniform State laws; State compacts.

(a) The Secretary shall encourage cooperative activities by the States and local governments for the prevention and control of air pollution; encourage the enactment of improved and, so far as practicable in the light of varying conditions and needs, uniform State and local laws relating to the prevention and control of air pollution; and encourage the making of agreements and compacts between States for the prevention and control of air pollution.

§ 1857d. Air quality standards and abatement of air pollution—Air pollution subject to abatement.

(a) The pollution of the air in any State or States which endangers the health or welfare of any persons, shall be subject to abatement as provided in this section.

Encouragement of municipal, State, and interstate action.

(b) Consistent with the policy declaration of this subchapter, municipal, State, and interstate action to abate air pollution shall be encouraged and shall not be displaced by Federal enforcement action except as otherwise provided by or pursuant to a court order under subsection (c), (h), or (k) of this section.

State standards; letter of intent; boards for hearings on standards; members, compensation, and expenses; violations; jurisdiction.

(c) (1) If, after receiving any air quality criteria and recommended control techniques issued pursuant to section 1857c—2 of this title, the Governor of a State, within ninety

days of such receipt, files a letter of intent that such State will within one hundred and eighty days, and from time to time thereafter, adopt, after public hearings, ambient air quality standards applicable to any designated air quality control region or portions thereof within such State and within one hundred and eighty days thereafter, and from time to time as may be necessary, adopts a plan for the implementation, maintenance, and enforcement of such standards of air quality adopted, and if such standards and plan are established in accordance with the letter of intent and if the Secretary determines that such State standards are consistent with the air quality criteria and recommended control techniques issued pursuant to section 1857c—2 of this title; that the plan is consistent with the purposes of this chapter insofar as it assures achieving such standards of air quality within a reasonable time; and that a means of enforcement by State action, including authority comparable to that in subsection (k) of this section, is provided, such State standards and plan shall be the air quality standards applicable to such State. If the Secretary determines that any revised State standards and plan are consistent with the purposes of this chapter and this subsection, such standards and plan shall be the air quality standards applicable to such State.

§ 1857d—1. Standards to achieve higher level of air quality.

Nothing in this subchapter shall prevent a State, political subdivision, intermunicipal or interstate agency from adopting standards and plans to implement an air quality program which will achieve a higher level of ambient air quality than approved by the Secretary.

July 14, 1955, c. 360, Title I, § 109, as added Nov. 21, 1967, Pub. L. 90—148, § 2, 81 Stat. 497.

Delaware Air Pollution Control Act, Del. Code Ann., tit. 7, § 6200, et seq.

§ 6202. Definitions.

As used in this chapter, unless the context otherwise requires——

(a) "Air pollution" means the presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant or animal life or to property, or which unreasonably interfere with the enjoyment of life and property within the jurisdiction of this State, excluding all aspects of employer-employee relationships as to health and safety hazards.

§ 6203. Powers.

(b) In exercising the powers conferred by this section, the Commission shall give due recognition to the fact that the quantity or characteristics of air contaminants or the duration of their presence in the atmosphere, which may cause air pollution in one area of the State, may cause less air pollution or not cause any air pollution in another area of the State and the Commission shall take into consideration in this connection such factors, among others found by it to be proper and just, as existing physical conditions, zoning classifications, topography and prevailing wind direction and speeds, and also the fact that a rule or regulation and the degree of conformance therewith which may be proper as to an essentially residential area of the State may not be proper as to a highly developed industrial area of the State. Added 55 Del. Laws, Ch. 442, § 1, eff. July 1, 1966.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1378

BISHOP PROCESSING CO., A BODY CORPORATE OF THE STATE OF MARYLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 31-38) is not yet reported. The opinion of the district court (Pet. App. A 39-44) is not reported.

JURISDICTION

The judgment of the court of appeals was filed on March 3, 1970. The petition for a writ of certiorari

was filed on March 31, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly implemented a consent decree by ordering petitioner to cease operations after finding substantial evidence that petitioner was violating the decree by its continuing interstate air pollution.

STATEMENT

The Bishop Processing Company of Bishop, Maryland, has operated a rendering and animal reduction plant in the vicinity of the Maryland-Delaware border since 1955. Starting in 1959, the Maryland and Delaware authorities spent some six years in negotiations with the company, seeking abatement of the nauseating odors emanating from its plant. After these negotiations proved fruitless, the Chairman of the Delaware Air Pollution Authority wrote to the Secretary of Health, Education and Welfare, requesting him to take action as contemplated by the Clean Air Act[1] "to secure the abatement of this air pollution problem."

Pursuant to that request, the Secretary implemented the first of the enforcement provisions of the Clean Air Act by calling a conference of concerned state and municipal agencies, 42 U.S.C. 1857d(d)

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[1] 77 Stat. 392, as amended, 81 Stat. 485, 42 U.S.C. (and Supp. IV) 1857 *et seq.*

(1), held in November 1965.[2] Bishop was notified of the conference's recommendations, which called on Maryland to require Bishop to take remedial action. After much more than the six-month statutory period passed without any action by Bishop on these recommendations, the Secretary called a public hearing, 42 U.S.C. 1857d(f)(1), held on May 17 and 18, 1967, at which Bishop was represented by counsel. The hearing board found that Bishop was causing an interstate pollution problem which could be cured by changes in Bishop's facilities, and recommended that these changes be made. The Secretary forwarded these findings and recommendations to Bishop on May 25, 1967, together with a notice, pursuant to 42 U.S.C. 1857d(f)(3), to "cease and desist from discharging malodorous air pollutants and to abate such pollution" by installing corrective devices not later than December 1, 1967. Bishop failed to take "action reasonably calculated to secure abatement of the pollution" and the Secretary, by letter of January 10, 1968, requested the Attorney General to file suit on behalf of the United States to secure abatement of the pollution. 42 U.S.C. 1857d(g)(1).

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[2] The administrative proceedings are described in greater detail in the opinion of the district court denying Bishop's motion to dismiss the complaint in the present proceeding. *United States* v. *Bishop Processing Co.*, 287 F.Supp. 624, 627-629 (D. Md.). The court had previously dismissed as premature a suit filed by Bishop during the administrative proceedings which raised many of the questions considered on denial of the motion to dismiss. See *Bishop Processing Co.* v. *Gardner*, 275 F.Supp. 780 (D. Md.).

The United States filed suit on March 7, 1968. Bishop moved to dismiss and, despite denial of the motion, n. 2, *supra*, did not then or ever answer the complaint. But after the case was set for pre-trial conference, Howard Polin, the company president, wrote to Bishop's then counsel in this case, requesting counsel to contact government attorneys and specifying the terms of a court order to which the company would consent.[3] Counsel forwarded this letter to government counsel, who responded by incorporating Mr. Polin's terms into a stipulation that a consent decree be entered permanently enjoining and restraining Bishop "from discharging malodorous air pollutants into the State of Delaware" (Pet. App. A 40). The district court was to retain jurisdiction for the purpose of enforcing the decree in the following manner:

(a) Upon the plaintiff's filing of an affidavit with the Court by the Director, Air Pollution Control Division, State of Delaware Water and Air Resources Commission, stating that the defendant is discharging malodorous air pollution reaching the State of Delaware, the Court will forthwith order the defendant to cease all manufacturing and processing operations in defendant's rendering and animal reduction plant located near Bishop, Maryland.

(b) The defendant shall have no recourse or appeal from the determination of the Director, Air Pollution Control Division, State of Dela-

[3] The full text of this letter, dated October 4, 1968, made part of the record in the district court and on appeal, is reproduced as Appendix 1 to this brief.

> ware Water and Air Resources Commission, tendered to the Court in the matter described in subparagraph (a) above.

The executed stipulation was filed and the consent decree entered on November 1, 1968.

Following the express terms of the consent decree, the United States subsequently filed a motion for an order to cease operations, supported by two affidavits affirming Bishop's continued interstate air pollution. At the close of a hearing on this motion on March 4, 1969, the district court decided to reserve ruling until further evidence could be submitted concerning Bishop's violation of the consent decree. On September 12, 1969, the United States filed a second motion, accompanied by a detailed affidavit by a meteorologist and supporting exhibits, showing numerous further incidents of pollution. The United States also filed an affidavit by the Acting Director of the Air Pollution Control Division of the Delaware Water and Air Resources Commission, stating in the terms required in the consent decree that Bishop was continuing to discharge malodorous air pollution reaching the State of Delaware. After a hearing, the district court filed its opinion, finding substantial evidence on which the Acting Director's affidavit could be grounded. On November 10, 1969, the court entered an order, pursuant to the consent decree, that Bishop "cease all manufacturing and processing operations" (Pet. App. A 45). That order, stayed pending final outcome of the controversy, was affirmed by the court of appeals.

ARGUMENT

Consistent with the provision of Rule 52(a), F.R.Civ.P., that "Findings of fact shall not be set aside unless clearly erroneous * * *," the court of appeals held that the district court's finding—that the evidence of continued interstate air pollution was sufficient to support the Acting Director's affidavit—was not clearly erroneous. This holding is entirely in accord with this Court's view that the findings of a trial court in a civil action should not be disturbed where the appellate court is not definitely and firmly convinced, on the entire record, "that a mistake has been committed." *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 123; *United States* v. *Gypsum Co.*, 333 U.S. 364, 365. Quite to the contrary, here the court of appeals was convinced that the district court's findings were correct.

Petitioner brushes aside the holding of the court of appeals in asking this Court to consider several questions not properly presented by the facts of this case. Petitioner contends that certain "understandings" existed at the time the consent decree was entered, the application of which would exclude precisely the evidence submitted to the district court showing petitioner's violation of the consent decree by continued interstate air pollution.[4] The court below properly rejected such contention (Pet. App. A, p. 36):

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[4] Attached as Appendix 2 is Judge Thomsen's certification, made part of the record in the district court on appeal, that no such "understandings" were communicated to the court at any time before the consent decree was entered or at the

> Whatever merit this argument might have in other circumstances, it must fail here. The consent decree is plain in its terms. Nowhere and at no time was it intimated that any finding of air pollution was to be based upon unexpressed "understandings" with respect to the investigative procedures. Neither before the entry of the consent decree, nor when the judge held a hearing and announced his interpretation of the decree for the guidance of the parties did Bishop disclose the existence of any "understandings" or reservations on its part.
>
> Bishop had ample opportunity to propose incorporation in the decree of any protection it may have felt necessary, and to object to procedures it deemed contrary to its understanding of the decree's terms. It cannot now ask the court to revise the decree by inserting language or to interpret it to embrace matters which, if present at all, were lurking in the recesses of Bishop's corporate mind.

Petitioner's attack on the sufficiency of the evidence ignores the plain language of the consent decree. The consent decree specifically contemplated the filing by the Acting Director of an affidavit stating that petitioner was continuing to discharge pollutants into the air reaching the State of Delaware. The district court interpreted as the consent decree requiring an evidentiary showing of a continuing pollution problem emanating from the plant. It found that that

---

hearing of November 1, 1968, during which the court inquired of the defendant of his understanding of the terms of the consent decree prior to its entry.

showing had been made and that the evidence submitted supported the affidavit. Nothing more was required.[6] Petitioner's third contention (Pet. 2, 28), that "cumulative pressures [on counsel] have contributed to a denial of due process of law," is equally lacking in merit. The record reflects no more "pressure" on petitioner's counsel than on respondent's counsel. Petitioner's dilatory tactics contributed substantially to the long delays encountered in bringing these proceedings under the Clean Air Act to ultimate resolution. It cannot now complain that the courts' waning patience with these delays was unwarranted.

In all events, the district court's implementation of the consent decree is clearly correct and does not present a question requiring this Court's review. The decisions below do not threaten the continued use of consent decrees in judicial proceedings, contrary to petitioner's contention, nor do they conflict with this Court's interpretation of the "clearly erroneous" test of Fed.R.Civ.P. 52(a).

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[6] Petitioner's suggestion, that the failure of the courts below to apply Delaware law threatens the development of the law in this field, is indeed curious. It was the inability of the Delaware authorities to obtain relief under state law that prompted the request for federal proceedings under the Clean Air Act, resulting in this suit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SHIRO KASHIWA,
Assistant Attorney General.

WALTER KIECHEL, JR.,
Deputy Assistant Attorney General.

ROBERT S. LYNCH,
Attorney.

MAY 1970.

APPENDIX 1

October 4, 1968

W. Edgar Porter, Esquire
132 E. Main Street
Salisbury, Maryland

Dear Mr. Porter:

I have given serious thoughts to the discussion we had yesterday regarding Pre-Trial Order No. 1 written by Mr. Kiechel, and your explanation of its contents to me. I have read and re-read the copy you gave me, and it seems very unfair to us.

You know and probably Mr. Kiechel knows that I would like to settle this matter. However, to be penalized by so doing is hard to swallow.

If I am correct, Mr. Kiechel, is willing to have a conference. You also told me that Mr. Kiechel, by telephone, has said that the government would not consent to anything that was not based upon the recommendations and findings and conclusions that the Board made following its hearing in our case, and which he has spelled out in his suggested Pre-Trial Order No. 1, that the government will insist that the Court find the violations that order states.

There are many things fallacious about the findings and conclusions. You may know or recall that H.E.W. sent advance men into the Delaware area before the hearings were held, to prepare the scene and tingle the atmosphere, to give advise and encouragement to would-be witnesses, eliminate poor ones (from their point of view) and in general to prepare for a successful hearing. A devilish situation was made by encouraging and suggesting exaggerations.

Among others, Mr. William H. Megonegel led the television camera crew, to nationally publicize the hearings, and a Mr. Boercher was special liaison to see that everything was carried out as prearranged. Also, you may recall the report of H.E.W. dealing with findings and conclusions was distributed on the second or third day of the meeting which only shows that this report was gotten up and printed prior to the meeting. The only conclusion I can draw is that the hearing was only "window dressing" and actually served no purpose. On the matter of recommendations the act states "giving due consideration to the practicability of complying with such standards as may be applicable and to the physical and economic feasibility."

Conditions relating to finances and the total lack of labor (in our area) has dictated to us a policy of prudence and conservatism. In light of this we have chosen, more realistically, have been made to choose,—a way in which no malodorous odors would go into Delaware. This has been accomplished by drastically reducing the designated odorous materials that previously were used by us.

However, I confess that I would like to settle this case, so that the time and money could be better used, and allow us to go about our daily business, which is difficult enough to run, and get relief from the worry and uncertainties that this case carries.

I would therefore agree to consent to a Court order forbidding us from causing any malodorous odors in the State of Delaware, and further, to fortify this order by agreeing that the Governor of Delaware or someone he designates be the sole authority under this agreement, with no recourse or appeal by us

from his decision and findings, in the event there is another charge we are violating.

Please submit this proposal to Mr. Kiechel promptly, so that you and he can put it in its proper language. If you and he agree upon a conference, I would want you to represent me therein.

Yours,

BISHOP PROCESSING COMPANY

By: /s/ Howard Polin
HOWARD POLIN, President

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. 19274

[Received Jan. 13, 5:00 p.m. '70,
Clerk, U. S. District Court, District of Maryland.]

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

BISHOP PROCESSING COMPANY, a body corporate of the State of Maryland, DEFENDANT

STATEMENT FOR THE RECORD

Bishop Processing Company has appealed (No. 14,148) from an order entered by this Court on November 10, 1969. In its appellant's brief, the following allegation appears (App. Br., p. 3):

> On November 1, 1968 the complaint was settled by a Consent Decree pursuant to which appellant agreed to close his plant if the Director of the Air Pollution Control Division, State of Delaware Water and Air Resources Commission determined that appellant had committed "malodorous air pollution" in the State of Delaware (43A). *Appellant agreed to the compromise and the risk of closing its plant with the understanding (1) that the Director of the Air Pollution Control Division, State of Delaware Water and Air Resources Commission would follow the procedures and standards required by the Delaware air pollution act Delaware Code Title 7, § 6201 et seq. and the regulations issued by the*

Water and Air Resources Commission; and (2) that the Director would specifically not rely on citizen complainants or representatives of the adversary, the federal government. [Emphasis added.]

The underlined recitation of "understandings" were not communicated to this Court by either defendant or plaintiff at any time before the consent decree was entered or at the hearing of November 1, 1968, during which this Court inquired of the defendant of his understanding of the terms of the consent decree, prior to its entry.

The Clerk is directed to docket this statement as part of the record in this case and forward it to the Clerk of the U. S. Court of Appeals for the Fourth Circuit, for inclusion in the record on appeal, pursuant to Rule 10(e), F.R.App.P.

/s/ Roszel C. Thomsen
ROSZEL C. THOMSEN
Chief Judge,
U. S. District Court

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

BISHOP PROCESSING CO., A BODY CORPORATE OF THE STATE OF MARYLAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER IN REPLY.

In its Petition for Writ of Certiorari, the petitioner presented the following questions of substantial importance:

I. Whether the legal principles governing the interpretation of agreements between private parties apply to court-approved consent agreements? (Petition for Writ of Certiorari, pp. 5-19).

II. Whether thirty-one instances of malodor over a consecutive fourteen-week observation period constitutes as a matter of law a violation of the federal Clean Air Act, 42 U. S. C. § 1857, *et seq.*, without regard for seasonal variations in relevant meteorological conditions (*e.g.*, wind direction and speed, temperature, humidity, and precipita-

tion), the duration of each malodor, the degree of offensiveness of each malodor, and the geographic pervasiveness of each malodor? (Petition for Writ of Certiorari, pp. 19-26).

III. Whether a series of unreasonable time limitations imposed upon petitioner by the federal district court and federal Circuit Court are such as to amount to a deprivation of due process of law? (Petition for Writ of Certiorari, pp. 26-28).

The respondent does not contest that these questions are of substantial importance and that, in consequence, they warrant review by this Court. Respondent's position seems to be that these questions are not presented by the facts.

With respect to the first question, respondent takes the same erroneous position of the district court and court of appeals, *viz.*, petitioner's interpretation of the consent decree must not prevail because (1) it is inconsistent with the "plain" terms of the consent decree and (2) petitioner had "ample opportunity" to include in the decree provisions it felt necessary.

There is no way in which the consent decree can rationally be characterized as "plain" or "unambiguous." The decree is totally silent on the meaning of the crucial words "malodorous air pollution." The courts below have ruled that whatever odor evidence the Director of the Air Pollution Control Division, Delaware Water and Air Resources Commission, finds sufficient is sufficient as a matter of law as long as he says it is sufficient. Seasonal variations in meteorological conditions—wind direction and speed, temperature, humidity, and precipitation—are irrelevant under the decree, although the decree does not say so. The duration of each malodor is irrelevant, although the decree does not say so. The degree of offensiveness of each malodor is irrelevant, although the decree does

not say so. The geographic pervasiveness of each malodor is irrelevant, although the decree does not say so.

The decree is also totally silent on the procedures to be used by the Director in marshalling and evaluating evidence of malodors. Although the decree does not say so, the Director, according to the courts below, had unlimited discretion and was free to be arbitrary in the gathering and analysis of malodor evidence.

The district court effectively prejudged the questions relating to the meaning of the decree. It decided that the decree which it had already accepted and approved had to be "plain" and it refused even to consider evidence to determine whether the decree was plain. This in and of itself is contrary to the principles governing the interpretation of private agreements, 3 Corbin on Contracts, § 542 (1963). Furthermore, the district court's own actions belie its characterization of the decree as "plain." At the first hearing in March 1969, the district court felt the need to inform the Director what the decree required of him (66a-77a). The procedures and standards to be followed were not "plain" to the Director and he had to be "fully apprised of exactly what was expected of him under the consent decree." (66a).

The respondent continues to rely on the district court's certification that petitioner's interpretation of the decree was never communicated to the court. It reasons that since petitioner had ample opportunity to incorporate its interpretation into the decree, petitioner is now estopped. However, this does not follow. Petitioner's failure to come forward with its interpretation of the decree prior to its acceptance by the court is in no way inconsistent with its coming forward subsequent to the entry of the decree. The error in the reasoning of the lower courts and respondent is that they assume petitioner anticipated that the Director

would do what petitioner now claims he should not have done under the decree. Not only did petitioner not anticipate the subsequent action by the Director, but it also had no reason to anticipate such action.

Petitioner assumed that there had been a meeting of the minds as a result of the letter of Mr. Howard Polin, President of petitioner, suggesting settlement. Brief for the United States In Opposition, Appendix 1. This letter showed that petitioner was willing to enter into a consent agreement to avoid a legal determination based on the kind of emotional and exaggerated testimony that resulted from the public odor hearings sponsored by HEW. Petitioner assumed that the letter suggesting settlement made it clear that the Director was (1) to rely on malodor evidence from sources other than HEW personnel and other than Selbyville residents who testified against petitioner at the HEW conference and hearing; and (2) to apply Delaware substantive law in determining whether there was an "air pollution" violation under the decree.

Respondent suggests that the procedural limitations petitioner assumed the Director would follow are so unusual as to be incredible. However, these procedural limitations are far from extraordinary in air pollution proceedings. Indeed, the State of Maryland, the state in which petitioner's plant is located, recently enacted air pollution legislation containing precisely the limitations petitioner had in mind. Md. Stat. Ann., art. 43, §§ 690, 698 (1967).

In retrospect it may be said that petitioner made a mistake in not insisting on a more specific decree. However, this kind of mistake is not uncommon. It has given rise to thousands of disputes relative to the interpretation of private agreements and has also given rise to a body of principles governing the interpretation of agreements. Under the reasoning of the lower courts and respondent,

there would never be a legitimate private contract dispute involving interpretation and meaning. Nor would a private party's interpretation of a consent decree ever prevail over the government's interpretation. All of the responsibility for ambiguities in a decree are assumed by the private party even where, as here, the government is the drafter of its language. Such a view is of course contrary to private contract law. 3 Corbin on Contracts, § 559, pp. 262-67; § 537, pp. 48-49; § 538, pp. 57-61; 64-70.

Respondent's position is that in interpreting consent agreements the government's view of the requirements of the public interest must prevail over the intent of the parties. This method of interpreting consent agreements is in direct conflict with this Court's ruling in *United States v. Atlantic Refining Co.*, 360 U. S. 19 (1959). If this method of interpretation is permitted to stand, it will tend to discourage consent settlements of government regulation claims and thereby tend to destroy a crucial means of effective and efficient administration and enforcement of government regulation laws. For a more detailed discussion, see Petition for Writ of Certiorari, pp. 15-19.

With respect to the second question, respondent takes the position that the Director's air pollution determination is a finding of fact which is not clearly erroneous and therefore should not be "disturbed." This is a familiar strategy designed to defeat appellate review. If you win at the trial level, on appeal characterize the issue as one of fact because of the limited scope of review of findings of fact.

Respondent's characterization of the issue, just as the court of appeals' characterization, is patently wrong. Petitioner does not and has not challenged the factual finding of the Director and the district court that during the period May 19, 1969 to August 24, 1969, there were 31 reports of malodors in the Selbyville, Delaware area. Petitioner

raises a question of law: Whether the Director and the district court in making the air pollution determination should have taken into account factors other than the frequency of reported malodors. In its Petition for Writ of Certiorari, petitioner pointed out that this case represents a test case for the government; that it is one of first impression in an increasingly important area of law; that the decision of the courts below threaten to begin the development of this new area of the law on an unsound basis; and that under the legal standards adopted by the courts below most of the plants in the country would be guilty of an air pollution violation. For a more detailed discussion of these points, see Petition for Writ of Certiorari, pp. 19-26.

The Court of Appeals' misapplication of Rule 52(a) of the Federal Rules of Civil Procedure in itself raises a substantial question appropriate for this Court's review. The Court of Appeals' interpretation of the clearly erroneous rule places it in direct conflict with the interpretation of other Circuits. See Petition for Writ of Certiorari, p. 22.

Respondent has conveniently ignored the points made by petitioner. Instead of addressing itself to the merits, it has chosen to attempt to persuade the Court that petitioner has in bad faith endeavored to delay the only just outcome, *i.e.*, the closing of petitioner's plant. The admission implicit in this choice of advocacy speaks for itself. On the matter of delay, the petitioner has acted promptly throughout these proceedings. Of course, any time a party is not willing to surrender and exhausts the legal remedies available, a final decision may take years as it has here.

Respondent has sought to impose on petitioner costly and untried odor control systems and devices. Petitioner has resisted because the costs were prohibitive, and there was no guarantee of success. Petitioner, however, took other steps to control malodors. It eliminated two-thirds

of the odor-producing materials. This was effective in eliminating malodorous air pollution. But, apparently because this is a test case under the Clean Air Act, the government has effectively ignored this and pressed for a closing of petitioner's plant.

Respectfully submitted,

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